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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No.

DANNY R. DAWSON,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND REQUEST FOR SUMMARY REVERSAL

Danny R. Dawson, your Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois, and the Petitioner further requests Summary Reversal.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported verbatim herein. (App. "A", pp. I-V.) It has not as yet been officially reported. The opinion of the State of Illinois Appellate Court, Fourth District, is reported verbatim herein. (App. "B", pp. I-XV.)

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on the 24th day of March, 1975. (App. "A", p. I.) The jurisdiction of this Court is invoked under the provisions of Title 28, U.S.C., Section 1257(3).

QUESTIONS PRESENTED

Whether the Petitioner should be discharged where inconsistent verdict expresses acquittal?

Whether the jury's verdict as to murder was a determination favorable to Petitioner of the facts essential to conviction of armed robbery?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Five, Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime . . . nor shall any person be subject for the same offense to be twice put in jeopardy for life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1, Amendment Fourteen, Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 2, Article 1, Constitution of the State of Illinois, 1970:

"No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."

Section 10, Article 1, Constitution of the United States:

"No person shall be compelled in a criminal case to give evidence against himself nor be twice put in jeopardy for the same offense."

STATEMENT

Defendant was found guilty by a jury in the circuit court of Morgan County of the offense of armed robbery, but not guilty of the alleged murder arising out of the same armed robbery. Judgment of conviction was entered on the verdict. Defendant was sentenced to an indeterminate term of 15 to 40 years.

Defendant and his accomplice, David L. Hawkins, were apprehended by the Morgan County authorities for the armed robbery of a Wareco Station located in Jacksonville, Illinois, and the murder of one Charles Duane McKinney, the service station attendant. On December 15, 1971, defendant and Hawkins were indicted in a three-count indictment: Count I charged defendant with murder in that "he did without lawful justification, intend to kill or do great bodily harm to Charles Duane McKinney, and did by the use of a gun shoot and kill the said Charles Duane McKinney," in violation of Ill. Rev. Stat. 1969, Ch. 38, Sec. 9-1(a)(1); Count II charged defendant with murder in that "he did without lawful justification, shoot and kill with a gun, Charles Duane McKinney, while committing a forcible felony, to-wit: an armed robbery," in violation of chapter 38, Sec. 9-1(a)(3); Count III charged defendant with the offense of armed robbery in that "he did take property from the person or presence of another, to-wit: Charles Duane McKinney, at the Wareco service station at 602 N. Main St., Jacksonville, Illinois, while armed with a dangerous weapon,". Hawkins plead guilty to the charge of murder and was sentenced to an indeterminate term of 35 to 95 years in the Illinois State Penitentiary.

Defendant's trial commenced on March 17, 1972. David L. Hawkins was called to testify for the State. He testi-

fied that he was serving a sentence of 35 to 95 years for the murder of Charles McKinney. He positively identified the defendant as being the same individual that had been with him on the night of the incident in question. He stated that he had known the defendant for five or six years.

Hawkins testified that he and defendant had been drinking beer in Winchester until approximately 1:00 a.m. on November 16, 1971. Thereafter, they went to Jacksonville to spend the night at defendant's sister's residence. On the way to Jacksonville, he and defendant had a conversation in which defendant allegedly stated that they needed more money to purchase beer and that defendant knew of a gas station that would be easy to rob.

They arrived at the gas station around 1:45 a.m., entered and bought a pack of cigarettes. Thereafter they left and drove around the block. On the way back to the station, defendant allegedly handed Hawkins a pistol and said, "If the dude gives you any trouble, just shoot him."

At this point in Hawkins' testimony, he identified People's Exhibit No. 6A — a .22 calibre pistol — as the weapon used in the incident. Hawkins stated that the pistol was owned by defendant and that it was normally kept in the glove compartment of defendant's automobile.

The witness stated that after they had circled the block, defendant let him out. Hawkins proceeded to the Wareco Service Station where he shot and robbed the victim. When asked by the state's attorney where the defendant was during this time, the witness stated: "He stayed out." Hawkins took the coin changer and an undetermined sum of cash from the deceased. Once in the automobile, he stated he dumped the contents of the coin changer and all the bills onto the seat of the car. The defendant then drove into the country on the "Poor Farm Road". Defendant

stopped his car on a bridge over a creek where they split the proceeds of the robbery. Defendant threw the gun and coin changer into the creek. He then proceeded to his sister's residence in order to establish an alibi. The witness contended that Dawson suggested that they needed an alibi.

On cross-examination, defense counsel questioned Hawkins concerning the nature of his relationship with defendant. Hawkins conceded that defendant was not an intimate friend, but rather a casual acquaintance. He also admitted he was high on drugs the night of the incident; that he was jobless at that time and dependent upon his mother and uncle for support; and that he had experimented with several types of drugs — angel dust in particular. This drug is a combination of cocaine, heroin and morphine. Under further cross-examination, the witness admitted he really did not know how many times he shot the attendant and that he could not clearly remember the defendant telling him that he should shoot the gas station attendant if the latter gave him any trouble. His lapse of memory was due to the fact that he had taken some heroin that evening, but he was positive that defendant had suggested that they needed an alibi. Cross-examination ended with a discussion of the condition of defendant's automobile on the evening of the incident.

When defendant took the stand, his testimony was completely at odds with that given by Hawkins. The defendant admitted that the murder weapon was his and presented a valid registration for the gun. He also admitted that he kept the pistol in the glove compartment of his car. He contended that the pistol was never loaded while it was in his glove compartment.

Concerning the night of the incident, the defendant testified that he met Hawkins around 9:30 or 10:00 p.m. on the

evening of November 15. He and Hawkins eventually decided to go to Jacksonville where they intended to "find some girls." They stopped at the Wareco Station in Jacksonville around 1:30 a.m. in order to purchase some cigarettes. Defendant admitted that he and Hawkins had been drinking before they went to Jacksonville. He denied that he ever suggested to Hawkins that they should rob the Wareco Station or that Hawkins should kill the attendant. After leaving the filling station, he and Hawkins drove away in his automobile. The car eventually died and he told Hawkins to go back to the Wareco Station to seek assistance. After Hawkins left, defendant got out of his automobile, opened up the hood and attempted to ascertain the nature of his trouble. He found a battery post was loose. He tightened the battery post and the car started. Hawkins had not yet returned so defendant backed up and turned onto a side street. Just at that moment, Hawkins came around the corner and got into the car. Defendant then drove off. According to defendant, Hawkins did not say anything concerning the robbery and the shooting. He did not notice anything in Hawkins' hand when he entered the car. After defendant had driven three or four blocks, Hawkins stated he had just killed the gas station attendant. At first defendant thought Hawkins was joking, so he kept on driving. He drove out to the edge of town in order to permit Hawkins to relieve himself and stopped as soon as he came to the "Poor Farm Road". It was at this time the defendant noticed the money changer and the gun lying on the floorboard of the car. He realized that Hawkins was not joking. Defendant stated he grabbed the gun and threw it, for he was afraid that Hawkins might try to shoot him. Defendant contended that at no time did he intend or plan with David Hawkins to rob the Wareco Station, nor did he instruct Hawkins to kill the attendant.

On cross-examination, the defendant denied that he had suggested to Hawkins that they should go to his sister's in order to establish an alibi. However, he admitted that he split the proceeds of the robbery with Hawkins.

The jury found defendant guilty of Count III of the indictment — armed robbery; and not guilty of Count I — murder; and not guilty of Count II — murder committed in the course of the armed robbery.

On appeal, the Appellate Court reversed. On further appeal by the State, the Supreme Court of Illinois reversed the appellate court.

The federal questions of constitutionality were raised on post-trial motions claiming error of the trial court and presented to the Appellate Court. The doctrine of collateral estoppel and double jeopardy was raised in the Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

The Supreme Court of Illinois has decided federal questions of substance in conflict with the due process principles enunciated in this Court. It has departed from the accepted and usual course of judicial proceedings, and its sanction of such departure resulted in an erroneous judgment and miscarriage of justice, and deprived the Petitioner of his rights to due process of law and equal protection of the law.

The jury returned a verdict of not guilty of murder which was signed. The jury also returned a verdict of guilty of armed robbery which was signed. These two verdicts are inconsistent in law and in fact and that therefore, the defendant should be discharged. The intention of the jury, however, is clear from their verdicts and therefore, on the basis of intention alone, the defendant should be discharged.

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It is noted that the jury was instructed that a person commits the crime of murder when he intends to kill or do great bodily harm, he knows that such acts create a strong probability of death or great bodily harm or he is attempting to commit or is committing the crime of armed robbery.

The jury was further instructed that to sustain the charge of murder the state must prove that when the defendant performed the acts which caused the death of the victim the defendant intended to kill or do great bodily harm or he knew that his act would cause death or great bodily harm or he knew that his act created a strong probability of death or great bodily harm or he was attempting to or was committing the crime of armed robbery.

Upon the record and state of facts, the only evidentiary basis for the crime of murder would have been a factual basis that the defendant was committing an armed robbery. In other words, a felony murder. A murder committed in the exercise of a felonious act. There is absolutely no evidence implied or otherwise, that the defendant intended to kill the victim for any reason other than in the commission of an armed robbery. The defendant did not know the victim nor had there been any connection established between them. Therefore, in order to find the defendant guilty of murder, the jury would perforce have to come to the conclusion that the defendant was committing an armed robbery at the same time because they were so instructed. The jury did not believe that the defendant was committing an armed robbery and therefore acquitted the defendant of the crime of murder. The jury did, however, convict the defendant of armed robbery. This is impossible because they answered it in the negative in the murder instructions.

The elements of felony murder are found in Illinois

Revised Statutes, 1971, chapter 38, paragraph 9-1, which provides in part:

> "(a) A person who kills an individual without lawful justification commits murder, if, in performing the acts which cause the death:
>
> (3) He is attempting or committing a forcible felony other than voluntary manslaughter."

Under Illinois Revised Statutes, 1971, chapter 38, paragraph 5-2, any individual who aids or abets the planning or commission of a crime is legally accountable for the conduct of the principal. Chapter 38, paragraph 5-2, would make an accomplice liable for the felony murder committed by his principal.

The jury was given instructions on accountability, armed robbery and murder which included a paragraph on felony murder. These instructions state in part as follows:

> "A person is responsible for the conduct of another person when either before or during the commission of a crime, and with the intent to promote or facilitate the commission of a crime, he knowingly solicits, aids, abets, agrees or attempts to aid the other person in the planning or commission of the crime."
>
> "A person commits the crime of armed robbery who, while armed with a dangerous weapon, takes property from the person or presence of another by the use of force or by threatening the imminent use of force."
>
> "To sustain the charge of armed robbery, the State must prove the following propositions:
>
> FIRST: That the defendant took money from the person or presence of Charles Duane McKinney; and
>
> SECOND: That the defendant did so by the use of force or by threatening the imminent use of force; and

BLEED

THIRD: That the defendant was armed with a dangerous weapon.

If you believe from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty."

"To sustain the charge of murder, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of Charles Duane McKinney.

Second: That when the defendant did so,

(1) he intended to kill or do great bodily harm to Charles Duane McKinney, or

(2) he knew that his act would cause death or great bodily harm to Charles Duane McKinney, or

(3) he knew that his acts created a strong probability of death or great bodily harm to Charles Duane McKinney, or

(4) he was attempting to commit or was committing the crime of armed robbery.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty."

"A person commits the crime of murder who kills an individual if, in performing the acts which cause the death,

> he intends to kill or do great bodily harm to that individual; or
> he knows that such acts will cause death to that individual; or
> he knows that such acts create a strong probability of death or great bodily harm to that individual; or
> he is attempting to commit or is committing the crime of armed robbery."

It is respectfully suggested that verdicts respecting the several counts of an indictment must be consistent, and that reversal is required where the verdict on the counts as to which defendant was convicted cannot be reconciled logically with that on the counts as to which an acquittal was returned.

The Federal Circuits have previously followed the same rule. In *Speiller v. United States,* 31 Fed. 2d 682, 684 (1929) a Third Circuit case the court held that where there is an acquittal on one count of an indictment and a conviction on another count of an indictment charging the same crime, the verdict of conviction will not be allowed to stand unless supported by evidence other than that on which the acquittal was based. There is no other evidence in the case at bar other than what the acquittal was based upon. In *Rosenthal v. United States,* 276 Fed. 714, 715 (1921) a Ninth Circuit cause of action, the court held that reversible inconsistency results where the verdict acquitting the accused on one count of the indictment tends to negate the existence of an element essential to the proof of the crime charged in another count on which he was convicted. The court said that a count charging the defendant with having the same property in his possession was acknowledged and a second count was based on the same transaction, and that the evidence showed only one transaction, a verdict finding the defendant not guilty on the first count but guilty on

the second count was wholly inconsistent and required a reversal. It is respectfully suggested that in the case at bar, there is a single transaction. Although the crime of armed robbery and the crime of murder are separate and distinct crimes, based upon the single transaction in the case at bar upon the evidence by the jury acquitting on murder considering the crime of armed robbery, the verdicts are inconsistent and the defendant must and should be discharged.

Further, it has been held that verdicts of acquittal on some counts, and conviction on other counts in an indictment may be reversibly inconsistent if the same evidence was relied upon by the prosecution in support of all the counts. *John Hohenadel Brewing Company v. United States,* 295 Fed. 489, at page 490 (1924) (C.A.3d)

It is conceded that all of the Federal Circuit cases heretofore cited were overruled by *Dunn v. United States,* 34 U.S. 390, 76 L.Ed. 356, 52 S.Ct. 189 (1932), which held that consistency between the verdict on the several counts of an indictment or information is unnecessary where the defendant is convicted on one or some counts but acquitted on others, and the conviction would generally be upheld irrespective of its rational incompatibility with the acquittal. However, it is noted, *Dunn,* supra, was decided on January 11, 1932.

Mr. Justice Butler dissenting said at page 398 that:

> "By finding petitioner not guilty under the second and third counts the jury conclusively established that the evidence was not sufficient to prove the unlawful possession or sale there alleged. Since the first count charged nothing more than unlawful possession, this amounted to contradictory findings on the same fact. But even if that count charged a nuisance, the unlawful keeping of that liquor for sale was essential to the

offense, in fact the corpus delicti, and the verdict of guilty necessarily included a finding of the very possession that was conclusively negatived by the verdict under the second count. If the finding of guilty on the first count were not contradicted by another finding contained in the same verdict or if it stood alone, a judgment would properly be entered thereon convicting petitioner of the unlawful possession."

"... Nothing remains to support the opposite finding under the first count. The repugnancy is such that if the first is accepted the second must be rejected. I am of opinion that this record plainly requires an express and unqualified decision that these findings conflict and are completely repugnant."

He further stated at page 400 that:

"Where one by different counts is accused of two crimes which by reason of their nature cannot be committed by the same person, a verdict of guilty on both counts will be held so inconsistent with itself and so uncertain in law that no judgment can be entered thereon. Such verdicts are so meaningless as to be without force."

As to jury speculation, Justice Butler stated at page 407 that:

"The law does not permit investigations into the deliberations of juries for ascertainment as a matter of fact upon what considerations verdicts are reached; the soundness of that rule has never been questioned. There are stronger reasons against speculating whether, or assuming that, the jury through tenderness of disposition, mercy or forbearance acquitted while knowing that its duty was to convict the accused. Conflict between the finding may not be explained. The inference that the jury, seeking rightly to discharge its duty, made a mistake is to be preferred over the suggestion that it found for defendant upon an assumption of power it may not lawfully exert."

In *People v. Hairston*, 46 Ill. 2d 348, (1970), the defen-

dant was tried for the separate crimes of murder, attempted murder, and solicitation to commit such crimes in a single proceeding. The defendant was found not guilty on the charges of the principal offenses. The defendant contended that the verdicts were inconsistent and that he must be discharged. The court held that when verdicts inconsistently acquit and convict of separate crimes arising from the same act, logical consistency in verdicts in such instances is not necessary, so long as the verdicts are not legally inconsistent. It is noted that the verdicts must not be legally inconsistent. The court said at page 849 that:

> "Within our own jurisdiction we have, in those instances where inconsistent verdicts of guilty were returned on separate indictments or separate indictments or separate counts of a single indictment, aligned ourselves with those who hold that a reversal and new trial must follow, (e.g., *Tobin v. People,* 104 Ill. 565 — larceny and receiving stolen property.) But where, as here, the verdicts inconsistently acquit and convict of separate crimes arising from the same act, our courts have followed the view that logical consistency in verdicts in such instances is not necessary, so long as the verdicts are not legally inconsistent. *(People v. Raddatz,* 403 Ill. 48, 85, N.E.2d 807; *People v. Ingersoll,* 58 Ill. App. 2d 216, 208 N.E.2d 79; and see *People v. Garman,* 411 Ill. 279, 103 N.E.2d 636) To use the words of the court in *State v. Baird,* 200 Wash. 227, 93 P. 2d 409, 412, we follow the view that: 'In law there is no inconsistency in verdicts of acquittal and conviction upon charges of crimes composed of different elements, but arising out of the same state of facts.' The verdicts here were legally consistent, if not logically so, and defendant's claim of a right to discharge must be denied."

II.

The defendant contends that his constitutional rights are violated by reason that he is incarcerated and under jury

conviction as to armed robbery in violation of the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States of America. The Fifth Amendment to the Constitution of the United States provides that no person shall be twice put in jeopardy for the same offense and the Fourteenth Amendment to the Constitution of the United States applies said prohibition to the states. The Constitution of the State of Illinois provides for the same.

It has been repeatedly held that a state cannot bring successive prosecutions for different crimes out of the same set of circumstances on the basis that the doctrines of Collateral Estoppel and Double Jeopardy bar successive prosecutions.

Query: Assuming that the Defendant, DANNY DAWSON, was acquitted of felony murder as in this case and subsequently tried in a separate trial for armed robbery, could the subsequent armed robbery trial proceed? To ask the question is to answer it in the negative as it would be barred by the doctrines of Collateral Estoppel and Double Jeopardy.

In *Sealfron v. United States,* 332 U.S. 575, 92 L.Ed. 180, 68 S.Ct. 237 (1948) the Court held that an acquittal of a conspiracy case was res judicata to a subsequent prosecution for the commission of the substantive offense as an accessory on the same circumstances and facts involved in the prior trial and conspiracy which resulted in an acquittal.

In *Ashe v. Swenson,* 397 U.S. 436, 25 L.Ed. 2d 469, 90 S.Ct. 1189 (1970) it was held that collateral estoppel in criminal trials is a integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments. Collateral estoppel is defined as simply that when an issue of ultimate fact has been once determined by

a valid and final judgment that issue cannot again be litigated between the same parties at any future lawsuit. In *Ashe*, supra, the petitioner was acquitted in a state trial for the robbery of one of the players in a poker game. Six weeks thereafter the petitioner was tried for the robbery of another of the players in the poker game and was convicted. The Court overturned the conviction.

In *Simpson v. Florida*, 403 U.S. 384, 29 L.Ed. 2d, 549, 91 S.Ct. 1801 (1971), the petitioner was tried and acquitted of the charge of armed robbery of a store manager. In a subsequent trial in State Court, the first trial having been a State Court trial, the defendant was convicted of the charge of armed robbery of a customer in the store. The Court said that unless the jury verdict in the second trial could have been grounded upon an issue other than that which the petitioner seeks to foreclose from consideration the constitutional guarantee against being twice put in jeopardy for the same offense officiates the petitioner's conviction.

In *Harris v. Washington*, 404 U.S. 55, 30 L.Ed. 2d 212, 92 S.Ct. 183 (1971) the Court held that a defendant who is acquitted for the murder of one of the persons where a bomb had been sent through the mail killing two people, and at a subsequent trial convicting the defendant for the murder of the other person, collateral estoppel was an integral part of the constitutional guarantee against double jeopardy and was to be applied and, therefore, the conviction was reversed.

In *Turner v. Arkansas*, 407 U.S. 366, 32 L.Ed. 2d 798, 92 S.Ct. 2096 (1972) in an Arkansas murder prosecution the trial court instructed on the criminal responsibility of an accessory and the jury was instructed that it must find defendant guilty of first degree murder if it found that he

had killed the decedent either with premeditation or unintentionally during the course of a robbery. The Court said that the only logical conclusion from the general verdict of the acquittal of the first degree murder charge was that the jury found the defendant was not present at the scene of the robbery and murder even if the murder had actually been committed by an alleged accomplice in the robbery. The Court held that a subsequent prosecution for robbery wherein the defendant was convicted was foreclosed as the State was collaterally estopped from relitigating the issue as to whether the defendant had been present at the scene.

The instruction in *Turner*, supra, was that "an accessory is one who stands by, aids, abets or assists . . . the perpetration of a crime . . . or persons being present aiding and abetting, or ready and consenting to aiding and abetting in any felony, shall be deemed principal offenders and indicted or informed against, and punished as such." The Court said at page 369 that "had the jury found petitioner present at the crime scene, it would have been obligated to return a verdict of guilty of murder even if it believed that he had not actually pulled the trigger. The only logical conclusion is that the jury found him not present at the scene of the murder and robbery, a finding that negates the possibility of a constitutionally valid conviction for the robbery of Yates."

In the case at bar, had the jury believed that the defendant committed armed robbery, it would have been obligated to return a verdict of guilty of felony murder.

If two separate juries hearing different offenses, based on the same circumstances and same facts, cannot arrive at opposite conclusions and the constitution prohibits a subsequent prosecution upon the same facts for different persons where the first trial has resulted in an acquittal it

is respectfully suggested that the same constitutional prohibitions apply to a jury verdict in the same case. We suggest that the doctrine of collateral estoppel and res judicata apply to the same jury who arrives at inconsistent verdicts.

In Illinois, the Supreme Court has taken the position that where a former prosecution results in an acquittal for a lesser included offense, a subsequent prosecution for the greater offense charged is barred. *People v. Liddell,* 353 Ill. 201, at page 204, 187 N.E. 2d 174 (1933).

A second application of the doctrine of double jeopardy as a bar to a subsequent prosecution for a different offense is that a former conviction or acquittal of murder will bar a subsequent prosecution for manslaughter based upon the same facts. *People v. Dugas,* 310 Ill. 291, at page 299, 141 N.E. 2d 769 (1923).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari and Request for Summary Reversal should be granted. The decision below is palpably erroneous.

Respectfully submitted,

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Springfield, Illinois 62705
Attorney for Petitioner

BLEED THRO

APPENDIX A

STATE OF ILLINOIS

SUPREME COURT

AT A SUPREME COURT, of the State of Illinois, sitting at Springfield:

BE IT REMEMBERED, that to-wit: On the 24th day of March, 1975, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

Docket No. 46787 — Agenda 6 — January, 1975.

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

v.

DANNY R. DAWSON,
Appellee.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

An indictment in the circuit court of Morgan County charged the defendant, Danny R. Dawson, in count I with the murder of Charles McKinney, in count II with the murder of McKinney while committing the forcible felony of armed robbery, and in count III with the armed robbery of McKinney. All three charges arose out of the November 16, 1971, robbery and murder of Charles McKinney, a service station attendant in Jacksonville, Illinois. David L. Hawkins, the defendant's companion, pleaded guilty to the charge of murder and was sentenced to imprisonment in the penitentiary for not less than 35 nor more than 95 years. The present defendant, Dawson, pleaded not guilty,

and after a trial, the jury found him guilty of armed robbery, but not guilty of murder.

The Appellate Court for the Fourth District, Justice Smith dissenting, held that the verdicts were inconsistent and therefore reversed the defendant's conviction on the armed robbery charge. (19 Ill. App. 3d 150.) We granted leave to appeal.

It is undisputed that David Hawkins robbed and shot to death Charles McKinney. At the defendant's trial, Hawkins testified that he and the defendant had been drinking together on the evening of November 15. As they drove to Jacksonville from a nearby town, the defendant suggested that he knew a gas station which they could easily rob. They stopped at the gas station and both went in and bought cigarettes. After buying the cigarettes they drove around the block and Hawkins stated that the defendant handed him a handgun belonging to the defendant and said, "Go ahead" and "If the dude gives you any trouble, just shoot him." Dawson, on the other hand, testified that he and Hawkins had never discussed robbing the gas station, that Hawkins had gone back and committed the crime on his own after the defendant's car had broken down several blocks from the service station, and that he was unaware that Hawkins had robbed the station until after they had driven out of town.

The jury was given an Illinois Pattern Jury Instruction (IPI Criminal No. 5.03), which states:

> "A person is responsible for the conduct of another person when, either before or during the commission of a crime, and with the intent to promote or facilitate the commission of a crime, he knowingly solicits, aids, abets, agrees or attempts to aid the other person in the planning or commission of the crime."

This instruction was followed by a description of the

elements of the offense of armed robbery and the requisite proof of that offense. The court then gave IPI Criminal instruction 7.02:

> "To sustain the charge of murder, the State must prove the following propositions:
>
> *First:* That the defendant performed the acts which caused the death of [Charles Duane McKinney];
>
> *Second:* That when the defendant did so,
>
> [1] he intended to kill or do great bodily harm to [Charles Duane McKinney], or
>
> [2] he knew that his act would cause death or great bodily harm to [Charles Duane McKinney], or
>
> [3] he knew that his acts created a strong probability of death or great bodily harm to [Charles Duane McKinney], or
>
> [4] he was attempting to commit or was committing the crime of [armed robbery].
>
> If you find from your consideration of all the evidence that *each* of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.
>
> If, on the other hand, you find from your consideration of all the evidence that *any* of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty." [Emphasis added.]

The appellate court majority treated the case as though it involved only a verdict of not guilty of felony murder under the accountability statute, and a verdict of guilty of armed robbery. Considering the case upon this assumption, we do not agree with the reasoning of the majority. Rather we think that the appropriate considerations are those discussed by Judge Friendly in *United States v. Carbone* (2d Cir. 1967), 378 F.2d 420:

> "The very fact that the jury may have acquitted of one or more counts in a multicount indictment be-

cause of a belief that the counts on which it was convicted will provide sufficient punishment, see Steckler v. United States, *supra,* 7 F.2d at 60, forbids allowing the acquittal to upset or even to affect the simultaneous conviction. We have repeatedly so held, *e.g.,* in United States v. Coplon, 185 F.2d 629, 633, 28 A.L.R. 2d 1041 (2 Cir. 1950), cert. denied, 342 U.S. 920, 72 S.Ct. 362, 96 L.Ed. 688 (1952), United States v. Marcone, 275 F.2d 205 (2 Cir.), cert. denied 362 U.S. 963, 80 S.Ct. 879, 4 L.Ed. 2d 877 (1960), and United States v. King, 373 F.2d 813, 815 (2 Cir. 1967). Indeed, if the rule were otherwise, the Government would be entitled to have the jury warned that an acquittal on some counts might undermine a guilty verdict on others — almost the opposite of the standard instruction, which is obviously beneficial to criminal defendants, and which the judge gave here without objection. It is true, as both Judge Hand and Mr. Justice Holmes recognized, 7 F.2d at 60, 284 U.S. at 394, 52 S.Ct. 189, that allowing inconsistent verdicts in criminal trials runs the risk that an occasional conviction may have been the result of compromise. But the advantage of leaving the jury free to exercise its historic power of lenity has been correctly thought to outweigh that danger. See United States v. Maybury, *supra,* 274 F.2d at 902-903." 378 F.2d 420, 422-423; see also *Dunn v. United States* (1932), 284 U.S. 390, 76 L.Ed. 356, 52 S.Ct. 189; *People v. Hairston* (1970), 46 Ill.2d 348.

But we think that the assumption upon which the appellate court majority considered the case failed to take into account the problems that confronted the jury. While the indictment contained three counts, only two forms of verdict were given to the jury — one form covering murder and the other armed robbery. The instruction dealing with murder (IPI Criminal 7.02) could have easily confused the jury because it provided that the jury had to find Dawson guilty beyond a reasonable doubt of *each* of the propositions listed in the instruction. Also, under the instructions which

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were given, the jury was required to find that the defendant, Dawson, had "performed the acts which caused the death of Charles Duane McKinney" or that "when the defendant did so he intended to kill or do great bodily harm to Charles Duane McKinney." The evidence, however, clearly indicated that it was Hawkins, alone, who committed the murder. It is true that the jury was given an accountability instruction (IPI Criminal 5.03); this instruction, however, was never incorporated into a murder instruction. We cannot assume that the jury took this abstract accountability instruction and used it to rewrite the murder instruction.

The "inconsistency" upon which the appellate court reversed the defendant's conviction of armed robbery was therefore nonexistent, and for that reason the judgment of the appellate court is reversed. Because other errors were asserted by the defendant which were not considered by the appellate court, the cause is remanded to that court for further consideration.

Reversed and remanded.

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APPENDIX B

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge
HONORABLE HAROLD F. TRAPP, Judge
HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 2nd day of May A.D. 1974, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 11981 — Agenda 73-121

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
DANNY R. DAWSON,
Defendant-Appellant.

Appeal from Circuit Court Morgan County

MR. JUSTICE CRAVEN delivered the opinion of the court:

Defendant was found guilty by a jury in the circuit court of Morgan County of the offense of armed robbery but not

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guilty of the alleged murder arising out of the same armed robbery. Judgment of conviction was entered on the verdict. Defendant was sentenced to an indeterminate term of 15 to 40 years and appeals.

While several issues are urged on appeal, we need discuss only the one which is dispositive. Defendant avers that the verdicts were legally inconsistent. We agree.

Defendant and his accomplice, David L. Hawkins, were apprehended by the Morgan County authorities for the armed robbery of a Wareco Station located in Jacksonville, Illinois, and the murder of one Charles Duane McKinney, the service station attendant. On December 15, 1971, defendant and Hawkins were indicted in a three-count indictment: Count I charged defendant with murder in that "he did without lawful justification, intend to kill or do great bodily harm to Charles Duane McKinney, and did by the use of a gun shoot and kill the said Charles Duane McKinney," in violation of Ill. Rev. Stat. 1969, ch. 38, ¶ 9-1 (a)(1); Count II charged defendant with murder in that "he did without lawful justification, (sic) shoot and kill with a gun, Charles Duane McKinney, while committing a forcible felony, to-wit: an armed robbery," in violation of chapter 38, ¶ 9-1(a)(3); Count III charged defendant with the offense of armed robbery in that "he did take property from the person or presence of another, to-wit: Charles Duane McKinney, at the Wareco service station at 602 N. Main St., Jacksonville, Illinois, while armed with a dangerous weapon,". Hawkins plead guilty to the charge of murder and was sentenced to an indeterminate term of 35 to 95 years in the Illinois State Penitentiary. See *People v. Hawkins*, 14 Ill.App.3d 549, 302 N.E.2d 128.

Defendant's trial commenced on March 17, 1972. David L. Hawkins was called to testify for the State. He testified

that he was serving a sentence of 35 to 95 years for the murder of Charles McKinney. He positively identified the defendant as being the same individual that had been with him on the night of the incident in question. He stated that he had known the defendant for five or six years.

Hawkins testified that he and defendant had been drinking beer in Winchester until approximately 1:00 a.m. on November 16, 1971. Thereafter they went to Jacksonville to spend the night at defendant's sister's residence. On the way to Jacksonville he and defendant had a conversation in which defendant allegedly stated that they needed more money to purchase beer and that defendant knew of a gas station that would be easy to rob.

They arrived at the gas station around 1:45 a.m., entered and bought a pack of cigarettes. Thereafter they left and drove around the block. On the way back to the station, defendant allegedly handed Hawkins a pistol and said, "If the dude gives you any trouble, just shoot him."

At this point in Hawkins' testimony, he identified People's Exhibit No. 6A — a .22 calibre pistol — as the weapon used in the incident. Hawkins stated that the pistol was owned by defendant and that it was normally kept in the glove compartment of defendant's automobile.

The witness stated that after they had circled the block, defendant let him out. Hawkins proceeded to the Wareco Service Station where he shot and robbed the victim. When asked by the state's attorney where the defendant was during this time, the witness stated: "He stayed out." Hawkins took the coin changer and an undetermined sum of cash from the deceased. Once in the automobile, he stated he dumped the contents of the coin changer and all the bills onto the seat of the car. The defendant then drove into the country on the "Poor Farm Road." Defendant stopped

his car on a bridge over a creek where they split the proceeds of the robbery. Defendant threw the gun and coin changer into the creek. He then proceeded to his sister's residence in order to establish an alibi. The witness contended that Dawson suggested that they needed an alibi.

On cross-examination, defense counsel questioned Hawkins concerning the nature of his relationship with defendant. Hawkins conceded that defendant was not an intimate friend, but rather a casual acquaintance. He also admitted he was high on drugs the night of the incident; and that he was jobless at that time and dependent upon his mother and uncle for support; and that he had experimented with several types of drugs — angel dust in particular. This drug is a combination of cocaine, heroin and morphine. Under further cross-examination, the witness admitted he really did not know how many times he shot the attendant and that he could not clearly remember the defendant telling him that he should shoot the gas station attendant if the latter gave him any trouble. His lapse of memory was due to the fact that he had taken some heroin that evening, but he was positive that defendant had suggested that they needed an alibi. Cross-examination ended with a discussion of the condition of defendant's automobile on the evening of the incident.

When defendant took the stand, his testimony was completely at odds with that given by Hawkins. The defendant admitted that the murder weapon was his and presented a valid registration for the gun. He also admitted that he kept the pistol in the glove compartment of his car. He contended that the pistol was never loaded while it was in his glove compartment.

Concerning the night of the incident, the defendant testified that he met Hawkins around 9:30 or 10:00 p.m. on the

evening of November 15. He and Hawkins eventually decided to go to Jacksonville where they intended to "find some girls." They stopped at the Wareco Station in Jacksonville around 1:30 a.m. in order to purchase some cigarettes. Defendant admitted that he and Hawkins had been drinking before they went to Jacksonville. He denied that he ever suggested to Hawkins that they should rob the Wareco Station or that Hawkins should kill the attendant. After leaving the filling station, he and Hawkins drove away in his automobile. The car eventually died and he told Hawkins to go back to the Wareco Station to seek assistance. After Hawkins left, defendant got out of his automobile, opened up the hood and attempted to ascertain the nature of his trouble. He found a battery post was loose. He tightened the battery post and the car started. Hawkins had not yet returned so defendant backed up and turned onto a side street. Just at that moment, Hawkins came around the corner and got into the car. Defendant then drove off. According to defendant, Hawkins did not say anything concerning the robbery and the shooting. He did not notice anything in Hawkins' hand when he entered the car. After defendant had driven three or four blocks, Hawkins stated he had just killed the gas station attendant. At first defendant thought Hawkins was joking, so he kept on driving. He drove out to the edge of town in order to permit Hawkins to relieve himself and stopped as soon as he came to the "Poor Farm Road." It was at this time the defendant noticed the money changer and the gun lying on the floorboard of the car. He realized that Hawkins was not joking. Defendant stated he grabbed the gun and threw it, for he was afraid that Hawkins might try to shoot him. Defendant contended that at no time did he intend or plan with David Hawkins to rob the Wareco Station, nor did he instruct Hawkins to kill the attendant.

On cross-examination, the defendant denied that he had suggested to Hawkins that they should go to his sister's in order to establish an alibi. However, he admitted that he split the proceeds of the robbery with Hawkins.

The jury found defendant guilty of Count III of the indictment — armed robbery; and not guilty of Count I — murder; and not guilty of Count II — murder committed in the course of the armed robbery.

Defendant contends that the jury rendered an inconsistent verdict when it returned the verdict of not guilty of Count II, murder committed in the course of the armed robbery, and guilty of Count III, armed robbery, and he should be discharged. He argued that armed robbery, being a forcible felony, is an essential element of felony murder; therefore, an acquittal on the charge of felony murder meant that the defendant had to be innocent of armed robbery. The State argues that the verdicts are not inconsistent because the jury could have found that the State failed to prove beyond a reasonable doubt the additional element of causing the death of the victim that is not present in the crime of armed robbery.

Both parties submit that *People v. Hairston*, 46 Ill.2d 348, 263 N.E.2d 840, is controlling. In *Hairston*, the Supreme Court said:

> "* * * But where, as here, the verdicts inconsistently acquit and convict of separate crimes arising from the same act, our courts have followed the view that logical consistency in verdicts in such instances is not necessary, so long as the verdicts are not legally inconsistent. (Citations) * * * [W]e follow the view that: 'In law there is no inconsistency in verdicts of acquittal and conviction upon charges of crimes composed of different elements, but arising out of the same state of facts'." (46 Ill.2d 348, 361-362.)

In determining whether verdicts are legally inconsistent, one must examine the elements of the crimes involved. If the crimes that the verdicts of acquittal and conviction are rendered on are composed of different elements, then different verdicts can stand. If the elements of the crime are the same, then the verdicts must be the same. The test is whether the elements in the count wherein the accused is acquitted are identical to, or must be found in order to support a guilty verdict upon the count which resulted in a conviction. If so, the verdicts must be identical. *(People v. Joyner,* 50 Ill.2d 202, 278 N.E.2d 76656.) A verdict which acquits the accused of a crime which includes acts necessary for the commission of another crime for which he is found guilty is inconsistent.

In this jurisdiction, the rule is that when a murder is committed during a robbery, all participants in the robbery are deemed equally guilty of the murder, and it is immaterial who fired the fatal shot. The defendant need not have been actually present at the killing in order to be guilty under the felony murder doctrine. *People v. Johnson,* 55 Ill.2d 62, 302 N.E.2d 20.

The elements of felony murder are found in Illinois Revised Statutes, 1971, chapter 38, paragraph 9-1, which provides in part:

> "(a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:
>
> * * *
>
> (3) He is attempting or committing a forcible felony other than voluntary manslaughter."

Under Illinois Revised Statutes, 1971, chapter 38, paragraph 5-2, any individual who aids or abets the planning or commission of a crime is legally accountable for the conduct of the principal. Chapter 38, paragraph 5-2, would make

an accomplice liable for the felony murder committed by his principal. *People v. Morris,* 1 Ill.App.3d 566, 274 N.E.2d 898.

The jury was given instructions on accountability, armed robbery and murder which included a paragraph on felony murder. These instructions state in part as follows:

> "A person is responsible for the conduct of another person when either before or during the commission of a crime, and with the intent to promote or facilitate the commission of a crime, he knowingly solicits, aids, abets, agrees or attempts to aid the other person in the planning or commission of the crime."
>
> "A person commits the crime of armed robbery who, while armed with a dangerous weapon, takes property from the person or presence of another by the use of force or by threatening the imminent use of force."
>
> "To sustain the charge of armed robbery, the State must prove the following propositions:
>
> FIRST; That the defendant took money from the person or presence of Charles Duane McKinney; and
>
> SECOND; That the defendant did so by the use of force or by threatening the imminent use of force; and
>
> THIRD; That the defendant was armed with a dangerous weapon.
>
> If you believe from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.
>
> If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty."
>
> "To sustain the charge of murder, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of Charles Duane McKinney,

Second: That when the defendant did so,

(1) he intended to kill or do great bodily harm to Charles Duane McKinney, or

(2) he knew that his act would cause death or great bodily harm to Charles Duane McKinney, or

(3) he knew that his acts created a strong probability of death or great bodily harm to Charles Duane McKinney, or

(4) he was attempting to commit or was committing the crime of armed robbery.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty."

"A person commits the crime of murder who kills an individual if, in performing the acts which cause the death,

he intends to kill or do great bodily harm to that individual; or

he knows that such acts will cause death to that individual: or

he knows that such acts create a strong probability of death or great bodily harm to that individual; or

he is attempting to commit or is committing the crime of armed robbery."

They found defendant not guilty of murder as charged under chapter 38, paragraphs 9-1(1) and 9-1(3), but guilty of armed robbery. It is clear from the above cited authority

that the jury's verdicts were legally inconsistent as well as logically inconsistent.

This court is aware of the line of authority which holds that each count in an indictment, when charging separate offenses, are separate and distinct as a matter of law, no matter how closely they may be related in fact, and that consistency in a verdict is not necessary. *Dunn v. United States*, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356.

In *People v. Taylor*, 56 Ill.App.2d 170, 205 N.E.2d 807, the court stated the above cited rule and discussed *People v. Raddatz*, 403 Ill. 48, 85 N.E.2d 32. The court noted that in *Raddatz* the appellant was found guilty of contributing to the delinquency of a minor, but innocent of the charge of indecent liberties. The evidence was the same for both charges and it was clear that the appellant was guilty or innocent of both charges; however, the appellate court noted that the Supreme Court found the jury could return a logically inconsistent verdict as long as the verdicts were not legally inconsistent.

In *People v. Garnett*, 113 Ill.App.2d 159, 251 N.E.2d 761, the court therein applied the rule found in *Taylor*. It held that the verdicts of guilty of attempted armed robbery and not guilty of murder were not inconsistent. The court predicated its holding upon the reasoning that the verdicts need not be treated as logically inconsistent since the jury could have believed beyond a reasonable doubt that the defendant participated in the armed robbery attempt, but had reservations about his actually stabbing the decease.

In *People v. Sanders*, 6 Ill.App.3d 820, 286 N.E.2d 785, it was held that a guilty verdict in the charge of armed robbery and an acquittal on the charge of murder was not legally inconsistent, notwithstanding the apparent logical inconsistencies of the verdicts. The court noted that the

crimes charged in the indictment were composed of different elements, even though they arose out of the same set of facts. The court relied on the rule found in *Hairston*.

We find these cases to be inapposite to the case at bar. This case presents a unique problem of apparent first impression. Here the court is confronted with an indictment that in Count I charges defendant with murder under chapter 38, paragraphs 9-1(1) and in Count II, murder committed in the course of a forcible felony under 9-1(3), and in Count III with armed robbery. The latter two offenses, while being separately charged, are in law a single offense if the armed robbery resulted in a death. For where two or more defendants have common design to commit an unlawful act, any act done by any of them in furtherance of the common design is the act of all, and all are generally guilty of whatever crime is committed. If the defendant was guilty of armed robbery that was accomplished by Hawkins (the principal), then he is liable for all of the acts of Hawkins, including the murder. When the jury found defendant not guilty of murder under chapter 38, paragraphs 9-1(1) and 9-1(3), they actually acquitted him of any participation in the only unlawful act giving rise to the murder — the armed robbery. The verdict of guilty of armed robbery was inconsistent for it found that defendant had participated in the crime that resulted in the felony murder of the gas station attendant. To say that defendant was not guilty of murder under paragraph 9-1 (3), the jury had to find that defendant was not guilty of armed robbery.

This case does not present a set of facts like those found in *Garnett* where the jury could have believed that the accused participated in armed robbery, but did not actually murder the deceased. The fact that defendant was found guilty of armed robbery meant he is liable under the theory

of accountability propounded by the State for the felony murder of the deceased. The defendant herein, as opposed to those in the *Garnett* and *Sanders* cases, was indicted for felony murder (ch. 38, par. 9-1(3)) as well as murder (ch. 38, par. 9-1(1)) and armed robbery.

The instructions given the jury concerning the two murder charges were inartfully drawn in that the two offenses were joined together in the same instruction. Also, in the body of the instruction disjunctive language was used, yet the last sentence of the instruction required the jury to view the instruction in the conjunctive. The result being that the instruction made it difficult for the jury to find the defendant guilty of murder under any theory.

We now turn to defendant's contention that he be discharged. In *Hairston,* the court stated that for a double jeopardy claim to be viable, defendant must establish that the two offenses charged are in law and in fact the same offense. The court went on to note it is the identity of the offense and not of the act which is referred to in the constitutional guarantee against double jeopardy. Furthermore, the court noted that double jeopardy bar has no application where two separate and distinct crimes are committed by one and the same act. The court stated:

> " ' * * * The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other'." (263 N.E.2d 840, 847.)

The defendant has been acquitted of felony murder. Such amounts to an acquittal on the charge of armed robbery

since under the facts and law of this case the two offenses are in law the same offense.

Accordingly, the judgment of conviction for armed robbery is reversed.

REVERSED.

TRAPP, J., Concurs; SMITH, P.J., dissents.

SMITH, J., dissenting:

I would affirm the conviction for armed robbery. The majority would acquit and discharge the defendant by concluding that the verdict of not guilty of murder and the verdict of guilty of armed robbery are legally inconsistent. This they do as we shall see by evading or avoiding the result in *Hairston* while on the surface approving its principles. In *Hairston,* as here, the liability of the defendant was grounded upon our accountability statute. There the defendant was indicted for murder, attempted murder and solicitation to commit murder. There the defendant argued that a verdict of guilty of solicitation is inconsistent with a verdict of not guilty of murder and attempted murder, and thus his discharge was required. The Supreme Court rejected this argument and affirmed the conviction for solicitation. When the Supreme Court there affirmed, why the majority here would acquit, escapes me.

If these verdicts are so legally inconsistent that a guilty verdict of armed robbery cannot survive, then the same legal inconsistency which destroys that verdict, destroys the not guilty verdict on murder also. The court in *Hairston* stated at page 361, "* * * It was aptly stated by a Missouri court in *State v. Akers,* 213 S.W. 424: 'If the verdict * * * was too inconsistent to support a judgment of conviction, it was likewise too inconsistent to support a judgment of acquittal. As has often been said, "it is a poor rule that

does not work both ways'' '.'' Our court stated unequivocally that where inconsistent verdicts of guilty were returned on separate indictments or separate counts of a single indictment, a reversal and a new trial must follow, and quoted with approval at page 362 from *State v. Baird*, 93 P.2d 409, 412, as follows: ''In law there is no inconsistency in verdicts of acquittal and conviction upon charges of crimes composed of different elements, arising out of the same set of facts.'' Our Supreme Court then concluded that the verdicts there were legally consistent if not logically so, and the defendant's claim of a right to discharge must be denied. In *People v. Sanders*, 6 Ill.App.3d 820, 286 N.E. 2d 785, the defendant was charged with murder, attempted murder and armed robbery. He was acquitted on the first two charges and convicted on the armed robbery charge. The court in *Sanders* specifically held that the verdict was legally consistent although not logically so. The crimes charged in the indictment were composed of different elements although they arose out of the same set of facts and cited *Hairston* with approval. It seems clear that we have an identical situation here. If the jury in this case had found the defendant not guilty of armed robbery and guilty on the felony murder count, a conviction on that count could not stand for the very simple reason that a felony murder conviction cannot be sustained if no felony was committed. In such instance, you have truly legally inconsistent verdicts. What the majority overlooks is that there were three counts in this indictment. The two murder counts were submitted under the same instruction and a single verdict returned. When one reviews the evidence, it seems quite clear that there is a rational basis upon which the jury predicated their single not guilty verdict on murder and their single guilty verdict on armed robbery. If they believed the testimony of Dawson that his car broke down and he sent Hawkins back to the filling station for help

rather than the testimony of Hawkins, then there is a factual basis for distinguishing between the culpable criminality of Hawkins and the culpable criminality of Dawson. Hawkins by his own testimony had committed the actual robbery and murder. He testified that the defendant told him to rob the service station, handed him a loaded revolver and stated, "If the dude gives you any trouble, just shoot him." Hawkins "shot him, robbed him, come back out." Dawson denied this testimony of Hawkins and said he sent Hawkins to the service station because his car had stopped on him. However, he did divide the proceeds of the robbery. On the theory of accountability, the majority seems to feel that the jury should have returned a verdict of guilty as to murder. Perhaps they should have, but I know of no rule of law that required them to do so. They did find him guilty of armed robbery.

To hold that this defendant is legally unaccountable on this three-count indictment on a theory of inconsistent verdicts and judicially hold that he is accountable for nothing strikes me as far more inconsistent than the jury's verdicts, either legally, logically, or factually.

Accordingly, it seems to me that in reliance on a purely legalistic theory, the majority uses our accountability statute to discharge a guilty defendant instead of using that statute as it was intended, that is, to authorize convictions on the principle of accountability, although there was no active actual participation or presence at the scene by the persons charged. It seems to me that if *Hairston* is to be followed at all, it should result in an affirmance of the defendant's conviction. That is what they did in *Hairston*, that is what we should do here. Cases collected in 18 ALR 3d 259, 274, suggest that this is by far the practical, prevailing view.